



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

CRS
Docket No: 8895-02
10 September 2003

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) Case Summary
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Marine Corps, applied to this Board requesting, in effect, that his naval record be corrected by removing the 9 September 1999 nonjudicial punishment (NJP) and certain derogatory service record entries.
2. The Board, consisting of Mr. [REDACTED], Ms. [REDACTED], and Mr. [REDACTED], reviewed Petitioner's allegations of error and injustice on 30 August 2003 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.
3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.
 - b. Enclosure (1) was filed in a timely manner.
 - c. On 18 February 1999 Petitioner reenlisted in the Marine Corps for four years as a corporal (CPL; E-4), after more than three years of prior active service. At that time, he was apparently still recovering from a gunshot wound he received on 13 June 1998.
 - d. On 12 May 1999 Petitioner's urine sample tested positive for marijuana, but no disciplinary action was taken. However, on 9 September 1999 he received NJP for absence from his appointed place of duty, a physical training formation, and failure to

obey a lawful order to do sit-ups. The punishment imposed consisted of forfeitures of \$714 per month for two months and restriction and extra duty for 45 days. He did not appeal.

e. On 9 September 1999 an entry was made on 11c of Petitioner's record concerning treatment for substance abuse. The same page also contains a counseling entry, dated 22 September 1999, that referenced the offenses for which he received NJP offenses, as well as his use of marijuana. He did not submit a rebuttal to either entry.

f. Subsequently, Petitioner was processed for separation by reason of misconduct due to drug abuse. However, on 17 December 1999, an administrative discharge board (ADB) found no misconduct and recommended that Petitioner be retained in the Marine Corps. This action was based on the ADB's belief that the positive urinalysis of 12 May 1999 resulted from Petitioner's innocent ingestion of marijuana.

g. Also on 17 December 1999, an entry was made on page 11d of the record that noted the ADB and stated "SNM retained in the U.S. Marine Corps by the Commanding General (CG), Marine Corps Base, Camp Lejeune, North Carolina on 991217...."

h. On 1 February 2000 Petitioner was promoted to sergeant (SGT; E-5). However, on 11 May 2000 the CG submitted a letter to the CG, 2nd Marine Division, stating that he disagreed with the findings of the ADB and recommending that the case be forwarded to the Secretary of the Navy in order that Petitioner could be discharged. However, documentation in the record reflects that he was retained in the Marine Corps in accordance with the recommendation of the ADB.

i. In his application, Petitioner contends that the NJP and related entries are unfair because his ability to perform physical training was limited by his ongoing recovery for the gunshot wound. Concerning the entry pertaining to drug abuse, he points out that he was "exonerated and retained" by the ADB.

j. An advisory opinion from Headquarters Marine Corps, dated 18 December 2002, recommends that relief be denied. In this regard, the opinion notes that no legal error occurred in the imposition of Petitioner's NJP. Additionally, the opinion believes that the entries on page 11c are correct. Further, the contrary finding of the ADB does not negate the drug entry or the counseling entry on page 11c, since confirmed incidents of illegal drug involvement must be recorded on a page 11. The opinion notes but does not discuss the entry on page 11d noting Petitioner's retention in the Marine Corps.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief. In this regard, the Board for the most part concurs with the advisory opinion. However, the advisory opinion essentially overlooked the page 11d entry of 17 December 1999 which noted the ADB and stated that the CG retained Petitioner in the Marine Corps. The entry is erroneous, since the CG clearly recommended discharge and did not concur with the ADB's recommendation for retention. Further, the entry mentions the ADB, which is argueably inappropriate since the ADB proceedings are not placed in the record if an individual such as Petitioner is retained in accordance with the ADB's recommendation. Since the ADB is not entered in the record, the Board believes no mention of it should be made in any service record entries. Accordingly, the page 11d entry of 17 December 1999 should be removed from Petitioner's record.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the 17 December 1999 entry on page 11d of the record.

b. That no further relief be granted.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

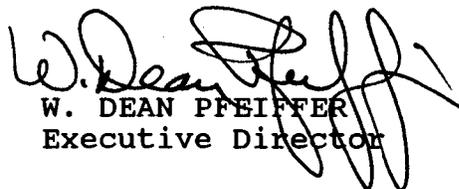
d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.


W. DEAN PFEIFFER
Executive Director